AHMAD DIN & ORS. v. PUBLIC PROSECUTOR

[A. Cr. J. (Hepworth J.) May 18, 1961]

[Kota Bharu — Kuala Trengganu Criminal Appeal No. 21 of 1960]

Criminal Law and Procedure — Theft — Abetment of house-breaking by night — Penal Code, ss.381, 109 and 457 — Statements by witnesses to police — Conflicting evidence by some witnesses in Court — Application by prosecution under Criminal Procedure Code (Cap. 6), s.113 — Requirements of s.113(ii) — Denial of contents of statements by witnesses — Necessity of formal proof of contents.

Evidence — Admissibility of words surplus to bare words said by accused leading to discovery of an exhibit or pointing out of some spot.

When an application is made under section 113 of the Criminal Procedure Code, before the statements are admitted, the Judge or Magistrate must indicate in his judgment that provisions of section 113(ii) have not been overlooked.

When a witness whose earlier statement is the subject of an application under section 113 does not deny making a statement but denies the contents, or some material part of the contents, of the statement under scrutiny, then the contents, or the material parts, must be formally proved by the evidence of the person who recorded the statement. In such a case, admission of the earlier statement into the evidence cannot be a substitute for formally proving the disputed contents, or portion of the contents.

Observations on particular instances of inadmissible evidence.

Cases referred to:—

(1) *Goh Seng Kok* v. *Public Prosecutor*, [1940] M.L.J. 82.

(2) *Muthusamy* v. *Public Prosecutor*, [1948] M.L.J. 57.

(3) *Jusoh bin Awang* v. *Public Prosecutor*, [1950] M.L.J. 69.

(4) *Osman Khan* v. *Public Prosecutor*, [1948] M.L.J. 56.

CRIMINAL APPEAL.

R. R. Chelliah for the 1st appellant.

2nd and 3rd appellants in person.

Pawan Ahmad bin Abdul Rashid (Deputy Public Prosecutor) for the respondent.

Hepworth J.: The 1st appellant had been convicted on two charges, the first of theft contrary to section 381 of the Penal Code and the second of abetment of house-breaking by night contrary to sections 109 and 457 of the Penal Code, and sentenced to one year's imprisonment on the first charge and 18 months' imprisonment on the second charge. The 2nd and 3rd appellants had been convicted of house-breaking by night contrary to section 457 of the Penal Code and each had been sentenced to 2 years' imprisonment. From these convictions and sentences the appellants appealed.

At the commencement of the trial there were 5 accused persons altogether, two of whom had been acquitted at the close of the prosecution case. These two persons were called as defence witnesses by the 1st appellant. They appeared as D.W. 1 and D.W. 2 in the records.

The learned Deputy Public Prosecutor applied under section 113 of the Criminal Procedure Code to use the statements made by these two witnesses to the police in the course of the police investigation to discredit them. Such statements are admissible even where such witnesses at the time of making the statements were accused persons provided that they are not accused persons at the time the statement was referred to (*Goh Seng Kok* v. *Public Prosecutor* (1)).

The next thing that happened in the case of each of these witnesses was that they were asked if they remembered making a statement to a Police Inspector and they said that they did. Thereupon in each case they were referred to certain parts of certain statements. Then D.W. 2's alleged statement was admitted as Exhibit D. 28 and D.W. 1's alleged statement was admitted as D. 29. At no stage does the learned President appear to have referred to either of the statements prior to their being used, as is required by sub-section (ii) of section 113 of the Criminal Procedure Code, nor were the accused persons furnished with copies of these statements. I do not think that this last point is of any very great importance because apparently no one asked for copies.

In cross-examination D.W. 1 having had certain portions of a statement put to him by the learned Deputy Public Prosecutor said, "I never said I travelled in a car driven by Mahmud with accused 2, 3 and Yusoff in it. I never said I went to Trengganu in the car." D.W. 2 said in cross-examination by the learned Deputy Public Prosecutor when certain portions of a statement were put to him, "I did not say I travelled to Chalok that night in Mahmud's car with Mustaffa, Musa and Prak Chum that night. I did not say that I climbed a hill in Trengganu." In the face of these denials the statements should have been formally proved. In fact they were admitted as exhibits on their bare admissions that they had made statements to the police. The persons who took the statements were P.W. 9 and P.W. 17, so the statements could have been formally proved quite simply.

The learned Deputy Public Prosecutor submitted that if the witness admits that he made a statement to the police then formal proof is not necessary. This, in my opinion, is altogether too loose a view of the law. In *Muthusamy* v. *Public Prosecutor* (2) Taylor J. said:—

> "The basic principle is that the Court is to decide the facts on the sworn evidence given in Court. What a witness said on some other occasion is *prima facie* irrelevant and if unsworn is *prima facie* less reliable. But if the witness has given one version of the incident to the police and gives a different version to the Court, it becomes a question whether his evidence can be relied on and therefore the former statement can — by the prescribed procedure — be used to impeach his credit."

So that for the purpose of discrediting the witness two things are required to be proved, one that he has given one version of the incident to the police, and the other that he has given a

different version to the Court. What he has said to the Court will have been recorded so that there is no difficulty as to that. What remains to be proved therefore is the version he has given to the police. A bare admission that he made a statement to the police in no way proves what he said to them. The moment he denies saying certain things which appear in a statement the question of whether he did in fact say those things is in issue and can be resolved only by formally proving the statement, thereby making the person who recorded it available for cross-examination. If he admits that the statement, the actual document, produced is the recording of his statement or if he admits saying what is stated in the statement then no formal proof is required. But nothing less will suffice. As I see it when Taylor J. in *Muthusamy* v. *Public Prosecutor, supra,* talks about a witness denying having made the alleged statement and Briggs J. in *Jusoh bin Awang* v. *Public Prosecutor* [3] refers to where an alleged statement put to a witness is denied, they are not referring to the witness having denied making a statement to the police at all but to the witness denying the making of the statement alleged.

Looking at it from a purely practical aspect this must be so. In the present case D.W. 1 was a Siamese speaking in Malay to a Chinese Inspector who was recording the statement in English. Does this combination not positively invite error?

Jusoh bin Awang v. *Public Prosecutor, supra,* and *Osman Khan* v. *Public Prosecutor* [4] are authority for saying that where statements to the police are admitted as exhibits and are used for the purpose of impeaching the credit of witnesses either for the prosecution or the defence without being properly proved it is an illegality.

The admission of these statements, D. 28 and D. 29, was highly prejudicial to the 2nd and 3rd appellants as well as the 1st appellant and the appeals of all three appellants must be allowed, but it was necessary to consider certain further matters before deciding what the final order was to be.

Certain statements were admitted which should not have been. Inspector Choong, P.W. 9 said that the statement which the 1st accused made to him that resulted in the finding of $3,000 was "I kept another $3,000 from the payroll inside a Lactogen tin and placed inside a water tank in my house." This was not objected to at the time but at a considerably later period of the trial. When P.W. 9 was recalled the matter was raised again and the learned President held that the words "from the payroll" should be struck out as inadmissible. It was, however, unfortunate that such prejudicial evidence should have been admitted in the first place.

Then again a detective sergeant, P.W. 18, gave evidence to the fact that a heap of ashes and burnt up things was found as a result of what the 2nd accused said to him. He said that the 2nd accused said to him, "This is the bag that I burnt." Later on in cross-examination by the 2nd accused he said, "This is the burning spot," and then said, "This is the bag which was burnt." Then as if that was not enough in reply to the Court he said the statement which the 2nd accused made that led to the discovery of the heap of ashes and burnt up things was "Try to look on the left side of the road, the bag that contained this money which I burnt." No objection whatever was taken to any of this evidence. The evidence of what the 2nd accused said on this occasion should have been confined to the statement, "This is the burning spot."

In examination-in-chief P.W. 9, Inspector Choong, said that on the 25th June, 1960, at about 12 noon he brought the 1st accused to his house at Chalok. While there he asked the 1st accused, "Have you got any money in the house and if so produce it." P.W. 9 said the 1st accused did not produce any money. It seems to me that this is tantamount to asking the question, "Have you got any money in the house?" and obtaining the reply, "No." The addition of the words in the question "and if so produce it" does not seem to me to alter the inference as to the answer to the first part. It seems to me, therefore, that this evidence should not have been admitted as it was in effect equivalent to a statement to a police officer in the course of an investigation.

I came to the conclusion that as there were a number of other unsatisfactory matters it was not a case in which I should order a re-trial. Accordingly, I allowed the appeals of all three appellants and quashed the convictions and sentences.

Appeal allowed.

MURUGAPPA CHETTIAR v. CHINNIAH

[O.C.J. (Ong J.) May 29, 1961]

[K.L. — Civil Suit No. 431 of 1959]

Land Laws — Registered co-proprietors — One undivided half share subject to charge — Co-proprietor seeking title deeds from chargee for subdivision of land into two separate lots — Building operations by co-proprietor — Chargee becomes co-proprietor by default of chargor — Whether an undivided half share in land creates an ipso facto interest in any house erected thereon.

In 1946 the defendant obtained permission from the owner of the land in question to build a dwelling house on the front half of the land in consideration of a ground rent of $5. One R. subsequently was granted permission to build another house at the back portion of this same piece of land on similar terms. In 1951 the land was transferred to a new owner and both the defendant and R. continued paying ground rent to the new owner as before. In 1955 the defendant and one W. became the registered co-owners of the said land in undivided equal shares — the plaintiff on the very day of the transfer being registered as chargee of W.'s undivided half share. As W. was unable to pay off the charge, three memorials